

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1336

To be argued by Roy M. Cohn and
Michael Rosen

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT

-----X
UNITED STATES OF AMERICA,

Appellee,

- against -

JOSEPH GAMBINO and CARLO CONTI,

Appellants.
-----X

REPLY BRIEF ON BEHALF
OF DEFENDANTS-APPELLANTS

SAXE, BACON & BOLAN, P.C.
Attorneys for Defendants-
Appellants
39 East 68th Street
New York, New York 10021
(212) 472-1400

ROY M. COHN
MICHAEL ROSEN
RONALD F. POEPPLEIN

Of Counsel

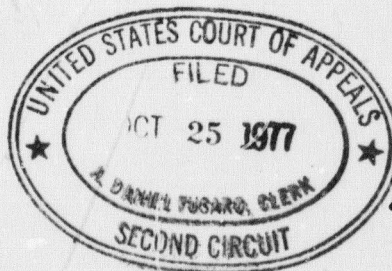


TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT	
POINT ONE: The Evidence Was Insufficient to Sustain the Conviction	2
CONCLUSION	6

TABLE OF CITATIONS

	<u>Page</u>
<u>United States v. Amato</u> , 495 F.2d 542 (5th Cir. 1974)	3
<u>United States v. Falcone</u> , 311 U.S. 205, 208 (1940)	2
<u>United States v. Nakadalski</u> , 481 F.2d 289 (5th Cir. 1973)	6
<u>United States v. Slaszczuk</u> , 517 F.2d 53, 60 (7th Cir. 1975)	4

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
- against - :
JOSEPH GAMBINO and CARLO CONTI, :
Appellants. :
-----X

REPLY BRIEF ON BEHALF
OF DEFENDANTS-APPELLANTS

This brief is submitted on behalf of the defendants-appellants in reply to the brief of the United States of America and in further support of their appeal from the judgments of conviction entered herein. We will not conduct a detailed re-examination of the facts herein as they are amply set forth in the appellants' initial brief to this Court as well as that of the government. However, one comment is necessary. The government, in its brief, as it did in the court below, has taken two contradictory positions to sustain these convictions. On the one hand, it asks this Court to accept its evidence of a long-range, continuous, conspiratorial plan between the appellants, while on the other, it completely ignores the background and relationship between the appellants and the alleged victims, the Darminios, by repeatedly pointing to certain isolated instances of alleged criminal activity.

The government cannot have it both ways - either this was a continuing operation or the "conspiracy" consisted of certain isolated, spontaneous instances unconnected with prior or future events.

We submit that the government has misinterpreted and misconstrued the applicable law in an attempt to fit the unique fact pattern of this case into the accepted legal theories applicable to the charges contained in the indictment.*

ARGUMENT

POINT ONE: THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION.

The government argues (Brief, page 20) that Gambino "directed and maintained a monopoly on commercial garbage collection ... through extortion, violence and loansharking." The appellants are not charged with any antitrust violations. In order to sustain these convictions, as the government admits, more than knowledge of illegal activity is necessary to sustain a conviction. United States v. Falcone, 311 U.S. 205, 208 (1940). When this fact is coupled with the accepted legal standard that participation in an illegal act does not necessarily become criminal conduct, the convictions must fall.

* For example, the government argues (p. 3, Government Brief) that the appellants "controlled virtually the entire private sanitation industry in Co-op City and other areas of the Bronx, New York during the years 1970 through 1976." From this statement, some sort of illegality is supposed to be assumed. And yet, witnesses repeatedly testified that economic necessity mandated contiguous stops within a confined area. Furthermore, the government repeatedly uses the American Automated incident to bolster its argument against Gambino, despite the fact that no evidence was offered which linked Gambino to this charge, and the Court, by its verdict, acquitted Gambino of all involvement with it.

United States v. Amato, 495 F.2d 542 (5th Cir. 1974).

Conveniently, the government's brief fails to distinguish the Amato case or to even mention it.

The fact that Conti and Gambino met often or that each referred to the other in conversations with witnesses adds nothing to the government case. This is but a further example of the government repeatedly attempting to attribute illegal conduct to open and innocent acts.

The government additionally argues that the Bernard Ettinger incident is further proof of "acting in concert." (Brief, page 22). Once again, this incident shows the totality of the relationship between the appellants and the Darminios. This relationship permeated the entire trial and revealed that when Anthony Darminio was threatened with foreclosure on his home, he went to Gambino for assistance; when almost the entire Darminio family needed work, they went to the appellants; when Peter Darminio socialized, he often did so with Gambino. It strains credulity to believe that if the appellants were threatening and extorting the Darminios, the relationship testified to would exist.

The final error of the government as to the conspiracy charge is the argument that:

"...the Government showed at trial that all the threats and violence perpetrated by Conti were done on the orders and at the behest of Gambino, ..." (Brief, page 23.) (Emphasis supplied.)

This proposition, if true, would neatly place this case within the accepted theory of conspiracy. However, the government

3-1771
fails to cite one reference in the Record which shows that Conti acted "on the orders and at the behest of Gambino." Failing this, no conspiracy can be sustained.

Apart from the conspiracy count, the pattern of racketeering count is equally defective. This Court should reject the Hobbs Act argument as a predicate crime to conviction under 18 U.S.C. §1962. The proof utterly failed to show a causal connection between any acts of the appellants and the fate of Terminal Sanitation beyond a reasonable doubt. When this Court considers the repeated references in the Record to Peter Darminio's high standard of living, Anthony Darminio's heroin habit and the repeated debts of Peter Darminio's to loan sharks on others; and the admission that "stops" were sole to pay Ettinger (Tr. 453), there is no "realistic possibility" that the acts of the appellants had "some effect on interstate commerce." United States v. Staszczuk, 517 F.2d 53, 60 (7th Cir. 1975) (en banc), cert. den., 423 U.S. 837. Nothing in the Record indicates that the "realistic possibility" of Terminal's demise at the hands of the appellants was proved beyond a reasonable doubt.

Once again the government improperly attempts to bolster its argument with reference to the American Automated incident. We must continually emphasize to this Court that Gambino was totally vindicated as to that charge.

The conviction under 18 U.S.C. §894 must fall for lack of evidence. Despite the government's "difficulty"

in understanding the appellants' argument this does not detract from the viability of appellants' argument. It is rather simple. The evidence indicated extensive transactions between the appellants and the Darminios. It was extremely difficult, if not impossible, to compartmentalize the evidence to the specific charges of Count 4 and to this understand exactly which transactions were allegedly "extortionate." As such, the prejudice was inherent.

As a further indicia of the insufficiency of the evidence, we are faced with the testimony of Ralph Torres which, we submit, failed to sufficiently corroborate the Darminios in crucial areas. It is certainly not inappropriate to argue two theories of insufficiency as the appellants have done herein.

The Hobbs Act convictions (18 U.S.C. §1951) must similarly fall. The claim that one cannot extort his own property was unquestionably raised at trial (Tr. 2826). Thus, the government's claim that this issue is being raised for the first time on appeal is clearly inaccurate.

As pointed out above, there was a lack of causal connection between the acts of the appellants and any affect on interstate commerce. The definition of extortion (Government Brief, p. 20), clearly shows that "property" must be obtained "from another" in order to constitute a violation of 18 U.S.C. §1951.* At least implicit in this is the fact that

* In appellants' original brief, the definition of "robbery" 18 U.S.C. §1951(b)(1) was inadvertently substituted for that of "extortion" (18 U.S.C. §1957(b)(2)). However, even substituting the correct definition does not detract from appellants' position.

the alleged victim must have a property interest in the property he is surrendering. However, the Record is replete with admissions by the Darminios that they never owned the Co-op City stops.

The fact pattern in United States v. Nakadalski, 481 F.2d 289 (5th Cir. 1973), cert. den. 414 U.S. 819, is not supportive of the appellee's position. The defendants therein had a claim to the money they sought from Whittice, but, significantly, had no interest whatsoever in the commercial enterprise from which the funds came to repay the loan. The testimony in the instant case reveals precisely the opposite situation.

As to Count 5 of the indictment, we submit that our initial brief amply covers the issues and will rely thereon.

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the judgments of conviction should be reversed.

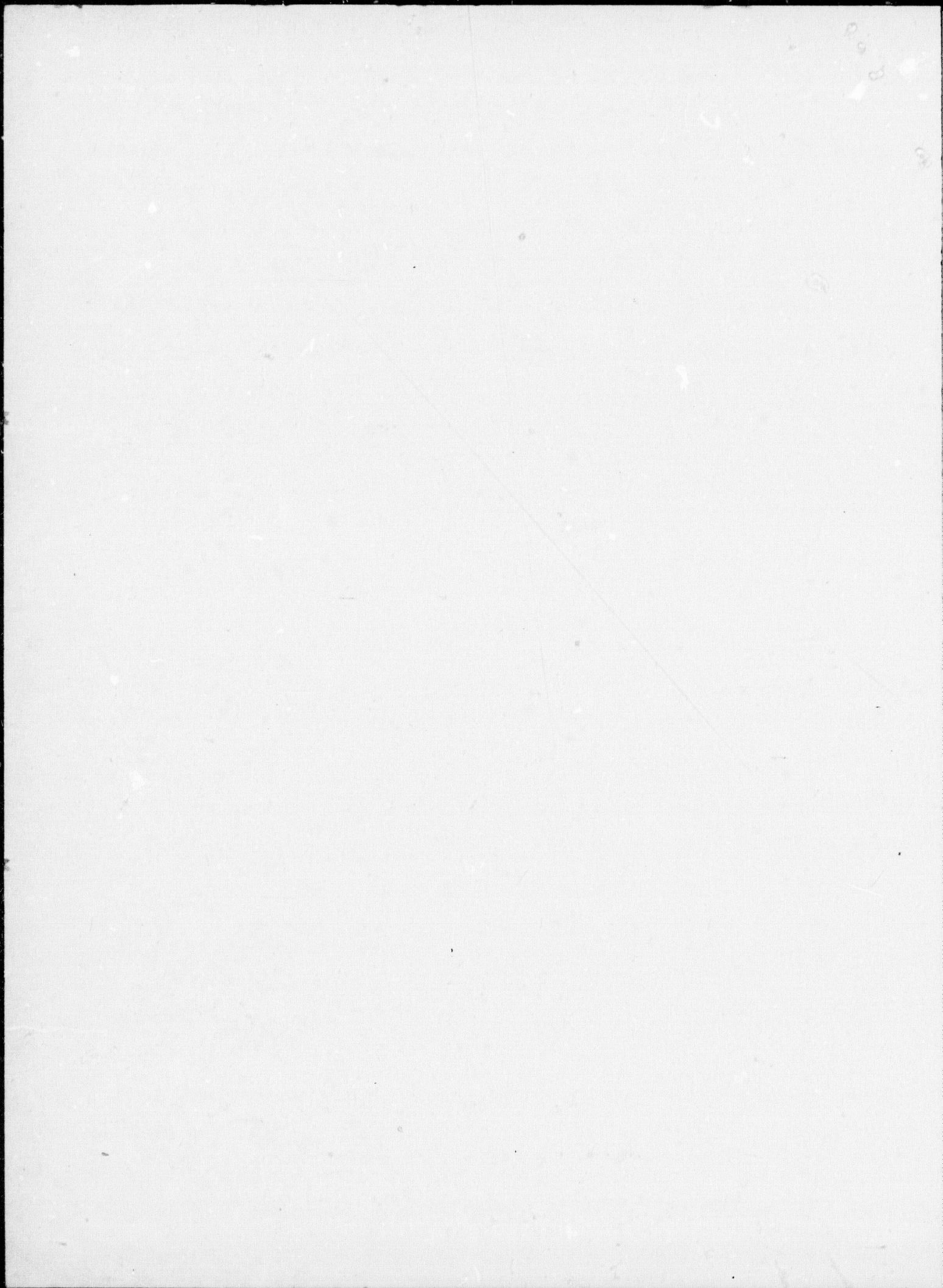
Dated: New York, New York
October 25, 1977

Respectfully submitted,

SAXE, BACON & BOLAN, P.C.
Attorneys for Appellants
39 East 68th Street
New York, New York 10021
(212) 472-1400

ROY M. COHN
MICHAEL ROSEN
RONALD F. POEPPLEIN

Of Counsel



COPY RECEIVED
ROBERT B. FISKE JR.
OCT 25 1977
U. S. ATTORNEY
SO. DIST. OF N. Y.